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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

EVELYN SMITH,

Petitioner,

v.

FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

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BRIEF OF RESPONDENTS KENNETH PHILLIPS AND GAIL RANDALL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FAIR EMPLOYMENT AND HOUSING COMMISSION, KENNETH PHILLIPS, AND GAIL RANDALL,

RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Kenneth Phillips and Gail Randall jointly oppose the petition for writ of certiorari. The judgment below was correct and just. A business owner who voluntarily enters the commercial marketplace and advertises to the general public should not be given a judicially-mandated exemption from a general nondiscrimination statute. The First Amendment does not require such an exemption. Congress intended the Religious Freedom Restoration Act (RFRA) to be used as a shield from government oppression, not as a sword to harm third parties. RFRA does not legalize religious discrimination.

SUMMARY OF REASONS TO DENY THE PETITION FOR CERTIORARI

1. There is no conflict with the judgments of other courts.

The judgment below does not conflict with any judgment of this Court, nor does it conflict with the judgment of any federal court or state Supreme Court. The judgment below declined to exempt a business owner from the nondiscrimination requirements of a civil rights statute because doing so would have caused harm to identifiable third parties. No state Supreme Court and no federal court has ever granted an exemption from such a statute under these circumstances.

When either the free exercise clause of the First Amendment or RFRA (42 U.S.C. §2000bb) has been invoked in a dispute between a litigant and the government, federal courts and state Supreme Courts uniformly have refused to accommodate the religious claims of a litigant if doing so would harm a third party. This case does not depart from such a rule.

2. The primary issue is not ripe for review.

The primary issue presented by petitioner -- whether free exercise of religion is substantially burdened by a statutory ban on discrimination that prohibits a for-profit business owner from imposing a religious test as a condition of tenancy -- is not ripe for review.

In similar disputes, Supreme Courts in Massachusetts, Minnesota, and Alaska avoided deciding the "substantial burden" issue as a *federal* question under the First Amendment or RFRA. Resolution of this issue now by this Court would be

premature.

Before addressing this issue on a national scale, it would be prudent for this Court to await further analysis by other courts in order to receive the benefit of their reasoning. Cases similar to the one at bench are currently pending in the federal district court in Alaska and in intermediate appellate courts in Illinois and Michigan.

3. Factual Reasons Support an Affirmance.

Granting review on the primary issue also would be unwise because, purely as a factual matter, the state has not imposed *any* burden on Smith's exercise of religion.

Smith believes that it is a sin to engage in sexual activity outside of wedlock. It is not a sin merely for an unmarried man and woman to live together. It is the sexual act that is the sin.

The court below did not find, nor is there any evidence in the record to prove, that the tenants previously had sexual relations with each other or that they would have done so in the rental unit. Although it was in dispute below, the California Supreme Court avoided deciding this factual issue. Absent such evidence, mandatory compliance with the fair housing law does not place *any* burden on Smith's religious beliefs or practices.

It would be an unwise use of judicial resources to grant review for the purpose of deciding an important legal issue, only to discover later that certiorari was improvidently granted because, as a factual matter, the judgment below does not place any burden on petitioner's exercise of religion.

4. It is premature to review the compelling interest issue.

It also would be premature to grant review of the secondary issue presented by petitioner -- whether denial of an exemption to a business owner, under either the First Amendment or RFRA, serves a compelling state interest in the least restrictive manner. Because the court below concluded that an exemption should be denied for a more basic reason, it did not decide whether the state had one or more compelling reasons not to grant a personal exemption to Smith from the non-discrimination mandate of the fair housing statute.

Two dissenting justices wanted to reach the merits of the compelling state interests issue, but they found that there were unresolved factual issues needing further development and therefore they concluded it would be necessary to remand the case to the Commission for another hearing. However, a majority of the justices did not rule on whether the compelling state interests issue could be resolved as a matter of law or whether it would be necessary, as the dissenters suggested, to remand the case for an evidentiary hearing on that issue.

Granting review of these issues now would be premature. Even if the "substantial burden" issue were reviewed now, as a matter of comity and judicial restraint, this Court should not decide the compelling state interests issues in the first instance. The state court should be allowed to decide the compelling state interests issue before this Court does so.

Furthermore, if the court below were to decide that a proper resolution of the issue (and numerous sub-issues) requires an evidentiary hearing, this Court ultimately would have the benefit of further evidence developed at such a hearing.

IMPORTANT FACTS WERE OMITTED FROM PETITIONER'S STATEMENT OF THE CASE

Petitioner's "Statement of the Case" is factually correct, as far as it goes. However, the statement omits various facts that are necessary to a full understanding of the case.

The four rental units owned by Smith are operated exclusively for business and commercial purposes, with income generated from the rentals reported as business income. The business is not organized or classified as a religious, charitable or other nonprofit concern. See opinion of the California Supreme Court found in an appendix to the Petition, hereinafter referred to as "Opinion in Petition" at p. 3a.

When a vacancy occurs in one of the units, the unit is advertised for rent in local newspapers and is otherwise available to the general public. See Opinion in Petition, p. 3a.

The petition represented that after Smith gave respondents a tour of a vacant unit, they falsely told her they were married. See Petition, p. 3. The petition fails to mention, however, that this representation was only made by respondents *after* Smith told them the previous day in a telephone conversation that she preferred to rent to married couples. See Opinion in Petition, p. 4a.

Smith does not inquire into the sex lives of her tenants, and wouldn't know if they actually engage in sexual activities she considers sinful. See Hearing Transcript, Volume II, p. 87.

Smith did not know if Phillips and Randall had a sexual relationship or whether they even shared the same bedroom. *Id*, pp. 67-68. She just "assumed" that Phillips and Randall

engaged in sexual activities. *Id*, pp. 74, 85, 88.

Smith has no religious need to inquire into the potential sexual activities of applicants or tenants. *Id*, p. 87. For example, she does not ask tenants about their sexual orientation, whether they have boyfriends or girlfriends, or whether they have overnight guests. *Ibid.* However, her religious beliefs would cause her to evict an existing tenant if she found out that the tenant committed a single act of nonmarital sex, even if the sexual conduct occurred in a place other than her rental property, such as a hotel. *Id*, pp. 87-89.

Smith does not have any secular reasons for not renting to unmarried couples. She does not believe that unmarried couples would be irresponsible or disruptive as tenants. *Id*, p. 80. On the contrary, she believes that it is possible that an unmarried couple could be a "model tenant" from a purely secular perspective. *Id*, p. 82.

Although she has a personal belief, there is nothing in the official written doctrines of her religious denomination that prohibits a landlord from renting to an unmarried couple. See Hearing Transcript, Volume I, p. 91, 100-110. No one in her church has ever told her that she would be subject to reprimand or discipline if she rented to an unmarried couple. See Hearing Transcript, Vol. II, p. 93.

Referring to the various notice posting requirements originally ordered by the Commission, the California Supreme Court found that "the commission offered to modify its order by eliminating the notice requirements to which Smith objected." See Fn. 15 of Opinion in Petition, p. 24a. The Supreme Court therefore did not consider the "hybrid rights" issue involving the alleged violation of her free speech rights. See Opinion in

Petition, p. 24a.

Smith's argument that "hybrid rights" are involved because the regulation of her property by the fair housing statute constituted an unconstitutional taking in violation of the federal constitution was also not considered by the California Supreme Court. See Opinion in Petition, p. 24a. Just as the free speech argument is not properly before this Court because the notice posting requirements were withdrawn by the Commission, neither is the issue of a taking without just compensation properly before this Court.

Smith never made a property rights issue in the Court of Appeal, nor did the opinion of the Court of Appeal deal with property rights in its "hybrid rights" analysis. Neither was the federal "takings clause" issue properly presented to the California Supreme Court. Smith never raised such an issue in her Answer to Petition for Review and that issue was not implicit in any of the other issues presented on the granting of review. See Reply Brief of Kenneth Phillips, filed in the California Supreme Court, p. 2-3. Therefore, the federal "takings" issue was not preserved below.

ARGUMENT

I

THE JUDGMENT BELOW DOES NOT CONFLICT WITH ANY JUDGMENT OF THIS COURT, OTHER FEDERAL COURT, OR STATE SUPREME COURT

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); see also *California v. Rooney*, 483 U.S. 307, 311 (1987). As a result, a petition for certiorari is granted not for the purpose of correcting statements made in majority or plurality opinions, but to determine whether a "legal error resulted in an erroneous judgment . . . ." *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Petitioner ignores this basic principle as she attempts to show a conflict that would pose a "compelling reason" to grant certiorari under this Court's Rule 10. Petitioner compares statements from the plurality opinion with statements from the opinions of other courts. Despite some asserted conflicting "statements," the fact remains that the judgment below does not conflict with any *judgment* of this Court or of any other federal court or state Supreme Court.

The judgment below denied a religiously based exemption from a civil rights statute to a for-profit business owner who advertised rental vacancies to the general public. An exemption was denied because it would have caused harm to the rights of respondent tenants. Speaking to the issue of third-party harm, the court below observed:

"The parties have not brought to our attention a single

case in which the [United States] Supreme Court exempted a religious objector from the operation of a general law when the court also recognized that the exemption would detrimentally affect the rights of third parties. Indeed, the notion that an accommodation might affect the rights of third parties led the Supreme Court in *Wisconsin v. Yoder, supra*, 406 U.S. 205, expressly to limit its holding to avoid such an implication. As limited, the decision cannot be read as authority for granting religiously based exemptions when to do so would sacrifice the rights of third parties." See Opinion in Petition, p. 38a.

A. The judgment below conforms to judgments by this Court and other federal courts.

Cases interpreting federal civil rights statutes uniformly hold that accommodation of religion is unwarranted if doing so will discriminate against or harm a third party. This Court's decision in *TWA v. Hardison*, 432 U.S. 63, 80-81 (1977), firmly established this principle in the context of employment discrimination. It has been uniformly followed by state and federal courts ever since. See cases cited below in the Opening Brief on the Merits of Kenneth C. Phillips, pp. 11-14.

The same principle has been used by this Court in its free exercise jurisprudence. When a religiously based exemption was granted from restrictions in an unemployment statute in *Sherbert v. Verner*, 374 U.S. 398, 409 (1963), this Court noted that the exemption did not "serve to abridge any other person's religious liberties." It also observed that exemptions are properly denied when the regulated conduct poses a threat to public safety, peace, or order. *Id.*, at 403.

In *Owen v. Baltimore & O.R. Co.*, 205 F.2d 58, 61 (2nd Cir. 1953), Judge Learned Hand wrote: "The First Amendment protects one against action by the government, though even then not in all circumstances; but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." This statement was quoted with approval by this Court in *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985).

In *United States v. Lee*, 455 U.S. 252 (1982), this Court denied an exemption to an employer because third parties would have been harmed. The Court reasoned: "Granting an exemption from the social security taxes to an employer serves to impose the employer's religious faith on the employees." *Id*, at 261.

Other federal cases agree that the accommodation of the free exercise of religion does not contemplate causing harm to third parties. See *South Ridge Baptist Church v. Industrial Commission of Ohio*, 911 F.2 1203 (6th Cir. 1990) [employer denied exemption from workers' compensation system because religious accommodation would harm employees who had a right to benefits if they were hurt on the job]; *Dawson v. Mizell*, 325 F.Supp. 511 (E.D. Vir. 1971) [worker denied exemption from mandatory work on Saturday because exemption would have violated the rights of other workers under union contract].

In a civil rights context, no federal case has been discovered in which a business owner was granted a religiously based exemption that entitled the owner to discriminate against a tenant or employee. Apparently, judges have heeded this Court's admonition that courts "must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause."

Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

As this Court observed in *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984), "Private biases may be outside the reach of the law, but the law cannot directly or indirectly, give them effect." A judicially-mandated exemption from a civil rights statute would have the effect of permitting discrimination against prospective tenants which would violate this principle.

B. The judgment below does not conflict with judgments of other state courts confronted with this issue.

Petitioner suggests that the judgment of the California Supreme Court conflicts with judgments of the supreme courts of Minnesota, Alaska, and Massachusetts. See Petition, p. 20. A close analysis of the cases cited by petitioner shows that none of these *judgments* is in conflict. In each of these cases, the state supreme court declined to grant an exemption to a for-profit landlord who discriminated against tenants whose alleged conduct violated the landlord's religious beliefs.

Furthermore, as petitioner concedes, none of these courts decided a *federal* constitutional issue, inasmuch as "these state supreme courts interpreted their state constitutions' free exercise clauses in these landlord cases ...." See Petition, p. 20. While some of these courts looked to federal law for guidance, the fact remains that the judgments in these cases rested solely on state law, with the exception of Alaska which rested its judgment (in favor of the tenants) in part on RFRA.

1. Minnesota

The first reported appellate decision similar to the case at bench arose in Minnesota. *State ex rel. Cooper v. French*,

460 N.W.2d 2 (Minn. 1990).

While the Supreme Court of Minnesota entered a judgment in favor of the landlord, it was rendered solely as a matter of state law. In Part I of the opinion of three justices, a plurality of the court concluded that as a matter of statutory construction the term "marital status" in the fair housing law was not intended by the legislature to prohibit discrimination against unmarried couples. *Id*, pp. 3-8. Justice Simonett joined the plurality to form a majority on the issue of statutory interpretation, stating: "I join in Part I of the court's opinion. Because the issue of statutory construction is dispositive here, I do not reach the constitutional questions." *Id*, p. 11.

Petitioner has distorted the holding of *French* by arguing that the Minnesota Supreme Court "found that prosecuting landlords for marital status discrimination for refusing to rent to unmarried couples **substantially** burdened their exercise of religion." See Petition, pp. 14, 20, 22. (Emphasis added.)

The plurality opinion in *French* focused solely on the state constitution. The state constitution does not protect the "exercise of religion" and does not contain a "substantial burden" test. Rather, it protects "liberty of conscience" which triggers a compelling interest test "whenever rights of conscience are burdened." *French, supra*, p. 9. Thus, under the state constitution, **any** burden on liberty of conscience must be justified by a compelling interest. This is not analogous to RFRA which requires a more stringent showing that government action imposes a "substantial burden" on the "exercise of religion." The plurality opinion in *French* acknowledged this difference, concluding that the state constitution "grants far more protection of religious freedom than the broad language of the United States Constitution." *Id*,

pp. 9-10. Thus, despite petitioner's assertion to the contrary, the three justices in the plurality did not conclude that the fair housing law imposed a "substantial burden" on the landlord's exercise of religion.

Three dissenting justices in *French*, however, did focus on the "first amendment right to free exercise of religion." *Id*, p. 13. While the dissenters acknowledged there was some burden imposed on the landlord by the fair housing law *(Id*, p. 14), they did not conclude that it was a substantial burden within the meaning of the federal constitution.

The dissenters stated that "by entering the public marketplace one is subjecting oneself to laws concerning public behavior, including antidiscrimination laws . . . ." *Id*, p. 15. This observation is consistent with an earlier judgment of that court. *State ex rel. McClure v. Sports and Health Club*, 370 N.W.2d 844, 853 (Minn. 1985) [voluntary entry into the commercial marketplace subjects a business owner to civil rights statutes prohibiting discrimination]. The dissenters in *French* explained:

> "Upon entering the public marketplace appellant could no longer consider just his rights and beliefs, but became subject to certain state laws and the rights of potential tenants. The legislature has not exempted an isolated sale or rental of property other than the property where the landlord resides. As respondent states, 'the First Amendment does not bestow upon the individual an absolute right to require others in the marketplace to adopt those values as a precondition to doing business with him or her.' Appellant is free, in his private life, not to associate with anyone whom he feels has the 'appearance of evil,' but when someone voluntarily enters the public marketplace he may encounter laws that are

inconsistent with his religious beliefs. While the Act imposes a burden on French's sincerely held religious beliefs that living together is a sin, such a burden is greatly lessened because it occurred only when French voluntarily entered into the rental marketplace ...." *Id*, p. 15.

Therefore, a careful reading of *French* reveals that neither the plurality nor the dissenters concluded that the fair housing law imposed a "substantial burden" on the landlord. While six justices found there was a burden, none found a "substantial burden" as is required by RFRA in order to trigger a compelling interest analysis. As a result, there is no conflict between *French* and the opinion below, even if this Court were to compare "statements in opinions" rather than the actual "judgments" of the two cases.

2. Alaska

Petitioner argues that in *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274, 281 (Alaska 1994), "every justice on the court found that the government had substantially burdened the landlord's rights under the compelling state interests test by prosecuting him." See Petition, p. 22.

There is no basis to this claim. *Swanner* did not use a "substantial burden" test in analyzing whether Swanner should be exempt from the fair housing law.

In its analysis of the state constitution's free exercise clause, the court held that the burden of proof shifted to the state to show a compelling interest if three criteria were met: "(1) religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her

religious belief." *Swanner*, 874 P.2d, p. 281. The court found that all three criteria were met and therefore went on to analyze whether the state could show a compelling interest to forbid marital status discrimination in housing transactions. Nowhere did the court discuss whether the statute imposed a "substantial burden" on the exercise of religion.

The court did, however, acknowledge that the fair housing law placed some burden on Swanner, but concluded that the burden was not constitutionally significant, explaining:

> "It is important to note that any burden placed on Swanner's religion by the state and municipal interest in eliminating discrimination in housing falls on his conduct and not his beliefs. Here, the burden on his conduct affects his commercial activities. In *United States v. Lee*, 455 U.S. 252 (1982), the United States Supreme Court stated the distinction between commercial activity and religious observance:
>
> 'When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith, are not to be superimposed on the statutory schemes which are binding on others in that activity.' *Id.* at 261." *Swanner*, p 283.

The court gave further reasons why the burden Swanner assumed when he voluntarily entered a regulated industry was not a constitutionally significant burden, stating:

> "Swanner has made no showing of a religious belief which requires that he engage in the property-rental business. Additionally, the economic burden, or

'Hobson's choice,' of which he complains, is caused by his choice to enter into a commercial activity that is regulated by anti-discrimination laws. Swanner is voluntarily engaging in property management. The law and ordinance regulate unlawful practices of the rental of real property and provide that those who engage in those activities shall not discriminate on the basis of marital status. [citation] Voluntary commercial activity does not receive the same status accorded to directly religious activity. [citation]

'As [James] Madison summarized the point, free exercise should prevail in every case where it does not trespass on private rights or the public peace.' Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 Chi. L. Rev. 1109, 1145 (1990) (citation omitted). Because Swanner's religiously impelled actions trespass on the private right of unmarried couples not to be unfairly discriminated against in housing, he cannot be granted an exemption from the housing anti-discrimination laws." *Swanner, supra*, pp. 283-284.

The court in *Swanner* did not utter a word about whether the fair housing laws imposed a "substantial burden" on Swanner under RFRA. Instead, it began and ended its analysis of RFRA with a finding that the nondiscrimination laws promoted a compelling interest in the least restrictive manner. On this score, the court concluded:

"Assuming that the Act is constitutional and applies to this case, it does not affect the outcome, because we hold in the next section that compelling state interests support the prohibitions on marital status discrimination. The most effective tool the state has for combating

discrimination is to prohibit discrimination; these laws do exactly that. Consequently, the means are narrowly tailored and there is no less restrictive alternative." *Swanner, supra*, 874 P.2d, p. 280, fn. 9.

Therefore, not only is the judgment of the Alaska Supreme Court consistent with the judgment of the California Supreme Court, statements in the *Swanner* opinion are consistent with criteria used in the plurality opinion below to determine whether a substantial burden exists. In other words, the two cases are not in conflict either in their judgments or in principles used to reach those judgments.

3. Massachusetts

Petitioner claims that the judgment below conflicts with the decision of the Massachusetts Supreme Court in *Attorney General v. Desilets*, 418 Mass. 316, 636 N.E.2d 233 (1994). See Petition, pp. 20-21. However, although some statements in the plurality opinion in *Desilets* may conflict with some statements in the plurality opinion below, the judgments are consistent. In each case the state Supreme Court reversed a lower court judgment that had granted an exemption to a landlord from a fair housing statute.

In *Desilets*, the Attorney General had filed suit in superior court alleging that the defendant had violated a state statute prohibiting marital status discrimination. The superior court granted a summary judgment for the landlord. Reversing that decision, the Supreme Court concluded that "the summary judgment for the defendants should be vacated." *Desilets, supra*, 636 N.E.2d, p. 235. The court reversed solely on the basis of the state constitution and found that no further discussion of rights under the First Amendment or RFRA was

necessary. *Id*, p. 236 and fn. 5.

A plurality opinion (three justices concurring), found that the fair housing law placed a "substantial burden" on the defendants' right to free exercise of religion under the state constitution. *Id*, p. 235-238. Justice Liacos concurred with the result reached by the plurality, and agreed "with the court's analysis of the protections provided the people of this Commonwealth under art. 46, § 1, of the Massachusetts Constitution ...." *Id*, p. 243. Therefore, these opinions rest on adequate and independent state grounds with respect to the issue of "substantial burden."

In any event, there is no conflict between the judgment in *Desilets* and the judgment below. In both cases the state supreme courts reversed judgments of lower courts that had been in favor of the landlords.

Furthermore, there is no conflict between the judgment below and the opinions of the courts in Massachusetts, Alaska, or Minnesota. Each of these other three cases were decided under the state constitutional provisions. Only in Alaska did the court specifically address a federal question and in doing so it issued a judgment for the tenants. As a result, there is no compelling reason to grant certiorari to resolve conflicting judgments on any federal issue since no such conflict exists.

II

THE PRIMARY ISSUE RAISED BY PETITIONER IS NOT RIPE FOR REVIEW

State Supreme Courts have unanimously refused to grant exemptions to for-profit landlords from the anti-discrimination mandate of fair housing statutes. These courts have sent a clear message to business owners who voluntarily enter the commercial marketplace in a religiously diverse society. The message is simple: you may not impose a religious test on consumers and refuse to do business with those who do not conform their conduct to your religious beliefs.

As argued above, this message does not conflict with any judgment of this Court or of any other federal court. While the case at bench contains issues that are fascinating from an academic perspective, certiorari does not exist for the purpose of answering academic questions.

RFRA is a relatively new statute. It would be prudent for this Court to allow issues concerning the constitutionality and application of RFRA to percolate longer, before this Court issues the final word that will bind the entire nation for years to come. Disputes involving the limits to be placed on religious liberty in a pluralistic society are difficult to resolve. It is wise to allow such issues to be developed by state courts and lower federal courts over time so that when this Court does enter the fray it will have the benefit of more years of judicial experience and analysis than presently exist.

"[N]o matter how much [the parties] may favor the settlement of an important question of constitutional law, broad considerations of the appropriate exercise of judicial power

prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 181 (1957). "Indeed, this principle of restraint grows in importance the more problematic the constitutional issue is." *Berkemer v. McCarty*, 468 U.S. 420, 446 (1984) (Stevens, J., concurring).

This is one of those occasions when the petition for certiorari should be denied because the substantial burden issue is "not ripe enough" and the question would "better await the perspective of time." *Darr v. Burford*, 339 U.S. 200, 227 (1950) (Frankfurter, J., dissenting).

Other cases similar to the case at bench are currently winding their way through lower and intermediate state and federal courts.[1] Someday one of them will probably reach this

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1. The case of *Jasniowski v. Rushing* is currently pending in the Illinois Court of Appeal, case number 95-0365. In that case, a trial court entered a judgment against a landlord who had refused to rent to an unmarried couple. The trial court denied an exemption under the state and federal constitutions and RFRA, finding that the law prohibiting discrimination did not impose a substantial burden on the landlord's exercise of religion. The landlord appealed. Oral argument on appeal has occurred and a written opinion soon will follow. The opinion of the lower court is attached to a "Request for Judicial Notice" filed in the California Supreme Court in the case at bench.

The case of *McCready v. Hoffius* is pending in the Michigan Court of Appeal, case number 185152. There, the trial court ruled for the landlord solely on statutory grounds. The landlord, however, continues to press the religious liberty exemption in the appellate proceedings. Oral argument is expected in the next few months.

The case of *Thomas v. Anchorage Equal Rights Commission*

Court, which will be time enough to resolve the issue petitioner seeks to have reviewed now.

Granting review on the primary issue raised by petitioner will also require review of the following preliminary question that is subsumed within the main issue: What is the exercise of religion?

In the court below, Respondent Randall challenged petitioner's claim that any conduct that is motivated by religious belief is, of necessity, the "exercise of religion" within the meaning of the First Amendment and RFRA. Randall devoted much of her brief to this issue. See Opening Brief on the Merits on Behalf of Gail Randall, Real Party in Interest, pp. 4-25.

Randall argued that, as a threshhold issue, a court must determine whether the conduct of a religious believer is the "exercise of religion" before the court should concern itself with the "substantial burden" issue or any other tests required by RFRA or the First Amendment. *Id*, pp 5-7. She argued that religious belief is not the same as the "exercise of religion," pointing out that RFRA specifically does not trigger a compelling interest test merely because a government regulation offends a litigant's religious belief. *Ibid.* She also argued that religious believers who enter the marketplace for personal profit

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is pending in the federal district court in Alaska, case number A95-0274-CV (HRH). There, landlords who did not agree with the *Swanner* decision filed suit in federal court claiming that *Swanner* violated their rights under RFRA and sought an injunction to prohibit the City of Anchorage and the State of Alaska from enforcing the ban on marital status discrimination against landlords who object to the fair housing laws for religious reasons. A hearing on a motion for summary judgment is scheduled for August 26, 1996.

cannot claim that religious motivation transforms their non-religious conduct into the "exercise of religion." *Id*, pp. 14-19.

The court below only touched upon this issue, stating: "While the renting of apartments may not be the exercise of religion, if Smith claims the laws regulating that activity indirectly coerce her to violate her religious beliefs, we cannot avoid testing her claim under the analysis codified in RFRA." See Opinion in Petition, p. 28a.

However, if review is granted, this issue will be before this Court as a preliminary question necessarily included in the larger question presented by petitioner. Furthermore, respondent "may rely on any ground that finds support in the record" as a basis to uphold the judgment below. *Chevron U.S.A., supra*, 467 U.S., p. 842, fn. 7.

The Supreme Court of Massachusetts recognized that decisions of this Court have "accepted, either implicitly or without searching inquiry," that any conduct motivated by religious belief is the exercise of religion. *Desilets, supra*, 636 N.E.2d, p. 237. Granting review in this case will require a probing examination and explicit ruling on this fundamental constitutional question.

III

IF CERTIORARI WERE GRANTED, THE JUDGMENT BELOW WOULD HAVE TO BE AFFIRMED FOR FACTUAL REASONS

Being required to rent to unmarried couples, especially in the absence of any evidence that they would engage in sexual relations inside the rental property, does not "substantially

burden" the exercise of Smith's religion. Smith has the burden of proof to demonstrate that her religious beliefs were substantially burdened in this case. *Northwest Indian Cemetery v. Peterson*, 764 F.2d 581, 585 (9th Cir. 1984). An **actual** burden must be proven. *Tony and Susan Alamo Foundation*, 471 U.S. 290, 304 (1985).

Smith has not met this burden of proof. Her decision not to rent to Phillips and Randall was based on her assumption that they would engage in sexual conduct inside the rental apartment. See Hearing Transcript, Vol. II, pp. 67-68, 88.

When the case was in the Court of Appeal, Smith relied on a so-called presumption in state law that an unmarried man and woman who live together are engaging in sexual intercourse. Petitioner's Response Memorandum, p. 3. She further argued that: "[t]he complainants and the State have a burden to rebut the legal presumption of sexual activity." *Ibid.*

The Court of Appeal did not address this issue, nor did the California Supreme Court when it was raised again by Smith in that court. In the Supreme Court, Smith argued that she was entitled to rely on a legal presumption of sexual activity in order to satisfy her burden of proof that her exercise of religion had been substantially burdened. See Brief of Evelyn Smith, Petitioner, pp. 17-19. Phillips argued that as a factual matter there was no burden on Smith's exercise of religion and that no such legal presumption existed in California law. See Opening Brief of the Merits of Kenneth C. Phillips, "Phillips Opening Brief," pp. 47-49. The Supreme Court apparently found it unnecessary to decide this issue because instead it found, as a matter of law, that Smith's exercise of religion was not substantially burdened.

If a writ of certiorari is issued to review the judgment below, it will be necessary for this Court to decide whether Smith has factually proven that a substantial burden exists. The resolution of this issue would require an analysis of unsettled questions of state law.

However, if certiorari were granted, a resolution of these intricate state law issues would be necessary to determine if Smith's religious liberty was *in fact* burdened.

IV

IT IS PREMATURE TO REVIEW THE ISSUE OF COMPELLING STATE INTERESTS

Petitioner asks for review of a secondary issue -- whether California has a compelling state interest sufficient to override Smith's religious liberty rights. See Petition, p. 25. Petitioner claims that the majority of the California Supreme Court "sidestepped" this question and "refused" to rule on it. *Ibid.* She urges this Court to decide it in the first instance.

The court below did not "refuse" to rule on or "sidestep" the numerous factual and legal issues involved in the many compelling state interests raised by respondents as justification for denying an exemption to Smith. Rather, it did what any responsible court would do. After deciding one preliminary issue that required a judgment for respondents, it properly left to another day the resolution of a myriad of other constitutional questions that were in dispute but the resolution of which was unnecessary to its judgment. The court's action in this regard is an excellent manifestation of judicial restraint.

Petitioner claims that the compelling state interest issue

in this case "is a question of law, so there is no reason to remand it back to the California Supreme Court." See Petition, p. 25. That may or may not be true. Two of the dissenting justices below concluded that the matter of compelling state interests could not be resolved as a matter of law. They found that the case should be sent back to the Commission for a hearing at which the state would be required to produce evidence in support of its contention that the denial of an exemption was supported by compelling state interests. See Opinion in Petition, pp. 106a-107a, 153a-154a. Neither Justice Mosk's opinion nor the plurality opinion reached any conclusion on the matrix of compelling state interests, including whether they could be resolved as a matter of law or whether an evidentiary hearing was necessary to their resolution.

Petitioner claims that the compelling state interests issue was "fully briefed" in the California Supreme Court. See Petition, p. 25. That is partially true. Respondent Phillips advanced several compelling state interests in the state Supreme Court but they were not answered by petitioner. In his reply brief in the state Supreme Court, respondent pointed out:

> "Phillips cited eight compelling interests served by denying Smith an exemption from laws prohibiting marital status discrimination in housing. [Phillips Opening Brief, (POB), 37-46.] Smith failed to address any of these arguments, except for a limited discussion of portions of Phillips' privacy arguments. For example, Phillips argued that:
>
> "***Avoiding Violations of Federal Law.*** The state has a compelling reason to deny Smith the exemption she seeks because such a judicial exemption would place the state's approval on religiously motivated discrimination in

housing -- conduct that is forbidden by federal fair housing law. (POB, 37.) Smith does not respond to this argument.

"***Combating Religious Discrimination***. Smith is not only engaging in marital status discrimination but her conduct constitutes religious discrimination as well, and the state has a compelling interest to eradicate religious discrimination by business owners and to avoid official complicity in such conduct. (POB, 37) Smith does not address this argument.

"Providing Efficient Administrative Relief. By granting exemptions for religious reasons, the court will be creating a system that will require extensive administrative hearings and further judicial proceedings in every case in which a religious claim is made by a business owner, thus destroying the current system that was designed by the Legislature to provide efficient administrative resolution of fair housing disputes. The state has a compelling interest in keeping an efficient dispute resolution system available to landlords and tenants. (POB, 38-39.) Smith does not address this argument.

"Equal Opportunity and Personal Dignity. Civil rights laws prohibiting arbitrary discrimination on bases that would not be 'suspect classifications' in an equal protection analysis, e.g., age, marital status, disability, sexual orientation, nonetheless promote compelling interests by providing equal opportunity to accessing the necessities of life and by protecting the personal dignity of consumers and employees from affront. (POB, 40-42.) Smith ignores this argument.

"***Personal Safety and Economic Security***. Considering today's economic conditions and high crime rate, many unmarried adults choose to live together for reasons of economic security and personal safety. The ban on marital status discrimination serves a compelling interest by removing arbitrary barriers to decisions by unmarried adults to share housing accommodations. (POB, 46.) Smith does not respond to this argument." See Reply Brief of Kenneth C. Phillips, pp. 7-8.

Therefore, in addition to the possible need for remand to determine various factual issues in dispute, many of the legal issues involved in the compelling state interest question were not fully briefed. Furthermore, even on the issues that were fully briefed, the Court properly did not decide them.

On the right of privacy the court below stated: "Randall, Phillips, and the commission argue that the right to privacy is one of several compelling interests, embodied in [the state statute], that justify the law's application to Smith over her religious objections.... Our conclusion makes it unnecessary to address the argument. See fn. 6 of Opinion in Petition, p. 9a.

The court also indicated: "Were we to adopt Smith's interpretation of Government Code section 12955, however, we would need to reconcile it, if possible, with the holding that persons in this state have a constitutional right to live with others who are not related by blood, marriage, or adoption, as an aspect of the right of privacy. (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 130-137.)" See fn. 10 of Opinion in Petition, p. 16a.

Responding to arguments that the federal constitution's establishment clause places limits on RFRA, the court observed:

"The parties opposed to Smith argue that RFRA cannot constitutionally be applied to enforce rights under the free exercise clause at the expense of the constitutional rights of third parties .... The conclusion set out below ... that RFRA does not require the state to accommodate Smith's religiously motivated housing discrimination ... makes it unnecessary to consider her opponents' specific argument about the limits of congressional power. See fn. 16 of Opinion in Petition, p. 25a.

After reiterating that it was not addressing various legal disputes involving the compelling state interest test, the court added: "Nor do we need to consider the contention of Randall, Phillips, and the commission that to permit Smith to discriminate on religious grounds would violate the establishment clauses of the federal and state Constitutions. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 4; *see Larkin v. Grendel's Den, Inc.* (1982) 459 U.S. 116 [invalidating, as an establishment of religion, state law empowering the governing bodies of churches to veto applications for liquor licenses].)" See fn. 21 of Opinion in Petition, p. 41a.

Such constitutional questions should not be decided by this Court in the first instance. "[I]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge...." *Ardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

In reviewing state court judgments, this Court "has, with very rare exceptions, refused to consider petitioner's claims that were not raised or addressed below." *EE v. Escondido*, 503 U.S. __, 118 L.Ed2d 153, 169 (1992). "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, fn. 5 (1988).

"[A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law .... *Webb v. Webb*, 451 U.S. 493, 499 (1981).

Whether for reasons of "comity" (*Nostrand v. Little*, 362 U.S. 474, 476 (1960)), "judicial economy" (*Board of Trustees, S.U.N.Y. v. Fox*, 492 U.S. 469, 485 (1989)), or because "prudence" dictates judicial restraint (*Austin v. United States*, 509 U.S. __, 125 L.Ed.2d 488, 505 (1993)), review of these issues should be denied.

CONCLUSION

The petition for certiorari should be denied. The judgment below is fair and just. It does not conflict with any judgment of this Court or any other federal court or state Supreme Court.

Furthermore, the judgment need not be as burdensome to petitioner as she claims. She will not have to sell her rental units in order to remain true to her religious beliefs, although she might chose to do so. If she does decide to sell, she could invest the proceeds, including any profits, in other capitalistic ventures that will not put her in direct contact with the public and therefore will not be likely to offend her religious sensibilities.

Nor does copliance with the law necessarily come at any economic expense to petitioner. Neither the state, nor

petitioner's religion, requires her to delve into the sexual activities of prospective tenants or to make assumptions about such intimate matters. At no financial cost, petitioner can protect her religious beliefs from potential offense by not inquiring or making such assumptions.

Petitioner also has another reasonable option. She could hire a property management company to fill vacancies that might occasionally occur, thereby insulating herself from possibly being offended by prospective tenants who do not share her religious beliefs. Hiring an agent may have a minimal cost. However, a religion-neutral law that happens to make religious exercise more expensive does not violate either the federal constitution or RFRA. *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). Furthermore, an adherent sometimes may endure a financial cost in order to comply with the demands of her religion. *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986).

Respectfully submitted:

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